

Northern Justice Project, LLC  
A Private Civil Rights Firm  
406 G Street, Suite 207  
Anchorage, AK 99501  
Phone: (907) 308-3395; Fax: (866) 813-8645

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James J. Davis, Jr., AK Bar No. 9412140  
Savannah Fletcher, AK Bar No. 1811127  
NORTHERN JUSTICE PROJECT, LLC  
406 G Street, Suite 207  
Anchorage, AK 99501  
(907) 308-3395 (telephone)  
(866) 813-8645 (fax)  
Email: jdavis@njp-law.com  
Email: sfletcher@njp-law.com

Attorneys for Plaintiff Randall Kowalke

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

RANDALL KOWALKE,

Plaintiff,

vs.

DAVID EASTMAN, STATE OF  
ALASKA, DIVISION OF ELECTIONS,  
and GAIL FENUMIAI in her official  
capacity as Director of Elections

Defendant.

Case No. 3AN-22-07404 CI

REPLY TO MOTION FOR EXPEDITED CONSIDERATION

The State opposes expedited consideration because of what it calls an "unnecessary fire drill." This entire "fire drill" has, however, been necessitated by the State's own abject failures. Not the plaintiff, who is now being forced to take the State to Court so that the State is forced to do its job.

As set forth in plaintiff's opposition to the State's motion to dismiss, the State

REPLY TO MOTION FOR EXPEDITED CONSIDERATION

*Randall Kowalke v. David Eastman, et al.*, Case No. 3AN-22-07404 CI

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has (and had) a clear duty to ensure that the candidates that it puts on our ballots are actually eligible under our laws and constitution to run for office.<sup>1</sup> But the State completely failed in this duty and now tells this Court it has no duty at all.<sup>2</sup>

Second, the State concocts an argument that plaintiff failed to pursue his "administrative appeal" under Appellate Rule 602.<sup>3</sup> This is more smoke and mirrors: nowhere in the State's June letter to plaintiff did it ever advise plaintiff that he had any right to any administrative appeal with anyone or any agency.<sup>4</sup> The Alaska Supreme Court has made it clear that, where an agency fails to inform a citizen of his rights to an administrative appeal, it cannot thereafter complain that the citizen failed to pursue this undisclosed right to an administrative appeal.<sup>5</sup>

In any event, and despite all the Defendants' hyperbole, a week-long timeline to brief a preliminary injunction is neither unreasonable nor unheard of.<sup>6</sup> In *State*

<sup>1</sup> See Plaintiff's Memorandum of Points and Authorities in Opposition to State's Motion to Dismiss at pp. 4-9.

<sup>2</sup> See Motion to Dismiss State Defendants at p. 2.

<sup>3</sup> See State's Opposition to Motion for Expedited Consideration at p. 1.

<sup>4</sup> See Exhibit 1. This letter says nothing about any appeal or anything about Appellate Rule 602(a)(2). The final line of the letter reads: "This determination is final and DOE will provide a copy of it and your complaint to Representative Eastman." There is no mention of an appeals process, let alone a deadline of thirty days to appeal.

<sup>5</sup> *State v. Nondalton Tribal Council*, 268 P.3d 293, 299 (Alaska 2012) (quoting *Manning v. Alaska R.R. Corp.*, 853 P.2d 1120, 1124 (Alaska 1993)) ("We have interpreted this language strictly, and made explicit that '[f]or Appellate Rule 602(a)(2) to apply, an agency must clearly indicate that its decision is a final order and that the claimant has thirty days to appeal.'").

<sup>6</sup> Nor is plaintiff's process in seeking an expedited timeline unheard of. Eastman had no counsel of record at the time plaintiff emailed regarding expedited consideration, and consequently Alaska Civil Rule 77(g)(4) does not apply. To the degree it does apply, it was not possible to attempt to resolve the issues with opposing

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*v. Galvin* the case went from a complaint filed in superior court to having a preliminary injunction appealed to the Supreme Court and ruled on all within four calendar days.<sup>7</sup> Similarly in *State v. Arctic Village Council*, twenty days after filing their complaint, plaintiffs moved for a temporary restraining order asking the court to restrain the Division from mailing absentee ballots until the court had decided the motion for preliminary injunction.<sup>8</sup> To accommodate the Division's election calendar, oral argument was held three days later on October 1 and a written order was issued on October 5.<sup>9</sup> In that case only three days passed between the Tribe's request for a restraining order and oral argument. Neither of these decisions suffered from "undeveloped, blinkered briefing and rushed decision-making."<sup>10</sup>

The State and Eastman incorrectly allege that plaintiff's proposed timeline is improper because of their speculations regarding plaintiff's intent. While there is no rule barring plaintiff from the filing timeline he has taken, even if there were, plaintiff is not a political schemer concocting the ideal time to wait to file to gain a "litigation advantage."<sup>11</sup> Eastman proposes this lawsuit have been filed at the start

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counsel beforehand — receiving an email from Eastman's counsel near midnight the day before plaintiff intended to file to expedite (and over two days after plaintiff's counsel initially wrote to Eastman), followed by a statement that plaintiff opposes any expedited timeline, does not show the possibility of a resolution. *See* Exhibit 3.

<sup>7</sup> *State v. Galvin*, 491 P.3d 325, 330-31 (Alaska 2021) (complaint filed September 14 and Supreme Court oral argument and decision issued within two hours of petition to Supreme Court being filed on September 18).

<sup>8</sup> *State v. Arctic Vill. Council*, 495 P.3d 313, 318 (Alaska 2021).

<sup>9</sup> *Id.*

<sup>10</sup> *See* State's Opposition to Motion for Expedited Consideration at p.4.

<sup>11</sup> Eastman's Opposition to Plaintiff's Motion for Expedited Consideration at p. 3.

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of 2022 following Eastman's filing of his letter of intent to run for reelection.<sup>12</sup> First, candidates may often file letters of intent without it being certain they will in fact run for the upcoming election — the Alaska Supreme Court has held that when factors are uncertain that a plaintiff need not have "20/20 hindsight" in knowing when he should have filed.<sup>13</sup> Second, sitting legislators cannot actually be brought into court while the legislature is in session, so plaintiff could not have proceeded in this litigation until the end of May.<sup>14</sup> Third, plaintiff pursued an appropriate first step before filing a case in court: he filed an eligibility complaint with the State.<sup>15</sup> To take roughly a month between a denial letter and filing a complaint is entirely reasonable — it takes time to find pro bono counsel, to decide whether one wishes to proceed with a case, and for counsel to draft a complaint on a novel issue, especially when counsel served two weeks of jury duty in the month of July.<sup>16</sup>

Lastly, it is perfectly clear why preliminary injunctive relief is necessary, and necessary on an expedited timeline: It is to ensure that the ballots mailed out for the

<sup>12</sup> Eastman's Opposition to Plaintiff's Motion for Expedited Consideration at p. 2.

<sup>13</sup> *See State v. Arctic Vill. Council*, 495 P.3d 313, 321 (Alaska 2021) (affirming no unreasonable delay in filing election case on September 8 despite knowing of COVID lockdown situation as early as March 13).

<sup>14</sup> Alaska Constitution, art. II, § 6 ("Legislators may not be held to answer before any other tribunal for any statement made in the exercise of their legislative duties while the legislature is in session. Members attending, going to, or returning from legislative sessions are not subject to civil process and are privileged from arrest except for felony or breach of the peace.").

<sup>15</sup> Exhibit 2.

<sup>16</sup> This should be apparent to Eastman, who has yet to file an answer to the complaint despite it being due on August 29, and who had no attorney enter an appearance until that same day. *See also* Eastman's Motion for Extension of Time.

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general election only have eligible candidates listed. This is also the duty of the Division, so its suggestion that an ineligible candidate could simply be removed from office after the election<sup>17</sup> is at best illogical and at worst a dereliction of its duties.<sup>18</sup> The Alaska Supreme Court has emphasized both the importance of fair elections and the importance of orderly elections.<sup>19</sup> Fairness requires only eligible candidates be on the general election ballot, and orderliness is ensured by adhering to the Division's Election Calendar.<sup>20</sup>

### CONCLUSION

Both the State defendants (Division of Elections and Director Fenumiai) and Mr. Eastman fail to cite a single legal basis for their opposition to an expedited timeline. The claims of unfair and unjustified rushing are baseless.<sup>21</sup> Plaintiff's expedited timeline ensures time for a fair decision without disrupting the Division's ballot-printing and distribution schedule.<sup>22</sup>

<sup>17</sup> See Opposition to Motion for Expedited Consideration at pp. 2-3.

<sup>18</sup> AS 15.25.042; AS 15.25.100(c); 6 AAC 25.260.

<sup>19</sup> *State v. Galvin*, 491 P.3d 325, 338-39, 341 (Alaska 2021).

<sup>20</sup> Additionally, to the degree defendants argue plaintiff is "too late" to bring such a complaint, they forget that the Division's own Elections Calendar and State law permit superior court challenges to the winners of a primary election to be filed up until September 12, 2022. AS 15.20.540(2); AS 15.20.550; see Alaska Division of Elections, Election Calendar, State of Alaska (last viewed Aug. 30, 2022), <https://www.elections.alaska.gov/Core/electioncalendar.php>.

<sup>21</sup> As are the arguments that expedited consideration is improper simply because one litigant has filed a motion to dismiss and another has filed motions to change venue and a motion for extension of time, none of which were filed to be considered on an expedited timeline.

<sup>22</sup> Plaintiff does not oppose holding an oral argument, as requested by the Division. Plaintiff is prepared for an oral argument on the request for a preliminary injunction, as soon as possible. See State's Opposition to Motion for Expedited Consideration at p. 4.

DATED this 31st day of August, 2022

NORTHERN JUSTICE PROJECT, LLC  
Attorneys for Plaintiff

By: s/Savannah Fletcher

Savannah Fletcher, ABA No. 1811127  
James J. Davis, Jr., ABA No. 9412140

**CERTIFICATE OF SERVICE**

I hereby certify that on this date a true  
and correct copy of the foregoing document  
was served via EMAIL at or before 9:00 am on:

Lael Harrison and Thomas Flynn  
State of Alaska, Department of Law  
Lael.harrison@alaska.gov  
Thomas.flynn@alaska.gov  
Courtesy copy emailed to: nomi.saxton@alaska.gov

Joseph Miller  
Law Offices of Joseph Miller, LLC  
info@aklaw.us  
millerlaw@aklaw.us

s/Savannah Fletcher  
Signature

August 31, 2022  
Date

Northern Justice Project, LLC  
A Private Civil Rights Firm  
406 G Street, Suite 207  
Anchorage, AK 99501  
Phone: (907) 308-3395; Fax: (866) 813-8645

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Director's Office  
240 Main Street Suite 400  
P.O. Box 110017  
Juneau, Alaska 99811-0017  
☎ 907-465-4611 📠 907-465-3203  
elections@alaska.gov



Elections Offices ☎  
Absentee-Petition 907-270-2700  
Anchorage 907-522-8683  
Fairbanks 907-451-2835  
Juneau 907-465-3021  
Nome 907-443-5285  
Mat-Su 907-373-8952

STATE OF ALASKA  
Division of Elections  
Office of the Lieutenant Governor  
June 20, 2022

Mr. Randall Kowalke  
PO Box 516  
Willow, AK 99668

Dear Mr. Kowalke:

The Division of Elections (DOE) received your complaint regarding the eligibility of Representative David Eastman as a candidate for House District 27. After reviewing public documents, DOE has determined that a preponderance of evidence supports his eligibility. *See* 6 AAC 25.260(e), (f).

When DOE receives a complaint regarding the eligibility of a candidate, it must determine the candidate's eligibility within 30 days. AS 15.25.042(a). Complaints must include certain information and be received by the close of business on the tenth day after the filing deadline. 6 AAC 25.260(a), (b). DOE reviews the relevant evidence it has, including the candidate's registration records and declaration of candidacy, and it can also review public records held by other state agencies. 6 ACC 25.260(d). DOE may only consider "candidate qualifications established by the United States Constitution, the Alaska Constitution, or the Alaska Statutes," excluding Chapter 13 of Title 15. 6 AAC 25.260(c).

You allege that Representative Eastman is disqualified by the state and federal constitutions. The state constitution disqualifies from public office anyone who advocates, or belongs to an organization that advocates, violent overthrow of the state or federal government. AK Const. Art. XII, sec. 4; *see also* AS 24.05.060. The Fourteenth Amendment prohibits anyone from holding state office if they took an oath to support the federal constitution and "engaged in insurrection or rebellion" against the federal government or gave "aid or comfort to [its] enemies." U.S. Const. Am. XIV, sec. 3.

To the extent these constitutional provisions apply, a preponderance of the evidence does not show that Representative Eastman is ineligible. DOE reviewed Representative Eastman's voter registration records and declaration of candidacy and it is unaware of any relevant records held by other state agencies. DOE is aware that Representative Eastman reportedly is a member of the Oath Keepers organization and attended the rally in Washington, D.C. on January 6, 2021. DOE does not have any specific information about these allegations in its possession. But even assuming these allegations are true, DOE has determined that they do not—without more—provide a basis to prevent Representative Eastman from running for state office.

This determination is final and DOE will provide a copy of it and your complaint to Representative Eastman.

Sincerely,

A handwritten signature in black ink, appearing to read "Gail Fenumiai".

Gail Fenumiai, Director

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June 10, 2022

From: Randall Kowalke

PO Box 516, 14137 E Wilderness Rim Road  
Willow, Alaska 99688

To: Gail Fenumiai

Director of Elections

Alaska Division of Elections

Sent by email: [elections@alaska.gov](mailto:elections@alaska.gov)

[gail.fenumiai@alaska.gov](mailto:gail.fenumiai@alaska.gov)


Dear Ms. Fenumiai,

David Eastman, a candidate for House District 27, is ineligible for public office per the Alaska and U.S. Constitutions.

Article XII, Section 4 of the Alaska Constitution states: "No person...who aids or belongs to any party or organization or association which advocates, the overthrow by force or violence of the government of the United States or of the State shall be qualified to hold any public office of trust or profit under this constitution." Eastman is a member of Oath Keepers, an organization which advocates the overthrow by force or violence of the government of the United States.

Amendment XIV, Section 3 of the U.S. Constitution states: "No person shall. . . hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature...to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof." Eastman has given aid and comfort to participants in the January 6th insurrection against the government of the United States.

Respectfully,



Randall Kowalke  
(907)315-0805

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Re: Kowalke v. Eastman; entry of appearance attached

From: sfletcher . (sfletcher@njp-law.com)  
To: millerlaw@aklaw.us  
Cc: millerlaw@acsalaska.net  
Date: Monday, August 29, 2022 at 07:51 AM AKDT

Thanks for confirming your position, Joseph.

Savannah

Savannah Venetis Fletcher  
Northern Justice Project, LLC  
516 2nd Ave, Suite 211  
Fairbanks, AK 99701  
sfletcher@njp-law.com  
Tel: (907) 308-3395  
Fax: (866) 813-8645  
[njp-law.com](http://njp-law.com)

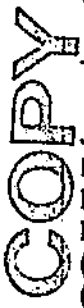
On Monday, August 29, 2022 at 07:49:02 AM AKDT, Law Offices of Joseph Miller, LLC <millerlaw@aklaw.us> wrote:

Hi Ms. Fletcher,

I just received your email below.

Yes, we oppose expedited. I've actually filed a motion for extension along with my entry.

Thank you,

 Joseph Miller  
Law Offices of Joseph Miller, LLC  
P.O. Box 83440  
Fairbanks, AK 99708  
(907) 451-8559 Office  
(888) 421-8803 Fax

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----- Original Message -----

On Monday, August 29th, 2022 at 7:30 AM, sfletcher . <sfletcher@njp-law.com> wrote:

Hi Joseph,

Attached is everything that has been filed to-date. I accept email service to sfletcher@njp-law.com.

I am also writing as required under Civil Rule 77(g). We will file a motion for preliminary injunction to remove Mr. Eastman from the November ballot and a motion to expedite this morning, August 29.

In our motion to expedite we will propose the following schedule:

- Opposition due by 9 am on Thursday, September 1.
- Reply due by noon on Friday, September 2.
- With the goal of having a decision by Tuesday, September 6.

This timeline is intended to align with the Division's planned ballot finalization schedule.

Please advise if you oppose expedited consideration. We intend to file by 9:30 am so a response by 9 am would be appreciated.

Thank you,  
Savannah

Savannah Venetis Fletcher  
Northern Justice Project, LLC  
516 2nd Ave, Suite 211  
Fairbanks, AK 99701  
sfletcher@njp-law.com  
Tel: (907) 308-3395  
Fax: (866) 813-8645  
[njp-law.com](http://njp-law.com)

On Sunday, August 28, 2022 at 11:47:34 PM AKDT, Law Offices of Joseph Miller, LLC <millerlaw@aklaw.us> wrote:

Ms. Fletcher,

Please find attached my entry of appearance for the above-captioned case. It will be filed tomorrow.

I would very much appreciate it if you would send me any pleadings to-date, including your entry appearance.

Many thanks,

Joseph Miller  
Law Offices of Joseph Miller, LLC  
P.O. Box 83440  
Fairbanks, AK 99708  
(907) 451-8559 Office  
(888) 421-8803 Fax

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